

**MODIFIED AGREEMENT FOR MAINTENANCE
AND REPAIRS OF FLOOD CONTROL AND ASSOCIATED DRAINAGE FACILITIES
LOCATED ON COUNTY PROPERTY IN FORMER
DRAINAGE DISTRICT NUMBER 6**

- A. WHEREAS, this agreement for maintenance and repairs of flood control and drainage facilities located on Snohomish County property in former Drainage District No. 6, ("Agreement") is made by and between SNOHOMISH COUNTY, a political subdivision of the State of Washington ("the County") and the CITY OF EVERETT, a Washington municipal corporation ("the City"). The County and the City are collectively referred to herein as "the Parties" and individually as a "Party."
- B. WHEREAS, on August 28, 2002, Snohomish County Council passed ordinance 02-040, dissolving Drainage District No. 6; and
- C. WHEREAS, the flood control facilities owned by former Drainage District No. 6, including dikes, drainage ditches, culverts and tidegates (the "Facilities"), provide flood protection functions that may be beneficial to the Parties; and
- D. WHEREAS, prior to the execution of the agreements outlined below, the City has made use of the Facilities located upon the property owned by the County, without compensation to the County or former Drainage District No. 6, to obtain some flood control and drainage benefits for the assets owned by the City described herein. The City desires to continue to make such use of these Facilities; and
- E. WHEREAS, the Parties listed above, as well as the Olympic Pipe Line Company, a Delaware corporation and Puget Sound Energy, a Washington Corporation (PSE), entered into an agreement for maintenance and repairs of flood control and associated drainage facilities located on County property in former Drainage District No. 6 ("Original Agreement"), with an effective date of June 1, 2004; and
- F. WHEREAS, in 2005 the Olympic Pipe Line Company withdrew from the Original Agreement after upgrading its facilities located in the former Drainage District No. 6; and
- G. WHEREAS, the City, County, and PSE updated the Original Agreement to reflect the new partnership and reduce the scope of work by entering into a revised agreement for maintenance and repairs of flood control and associated drainage facilities located on County property in former Drainage District No. 6 ("Revised Agreement"), with an effective date of January 1, 2006; and
- H. WHEREAS, the City, County, and PSE amended and restated the Revised Agreement to the extend the term, adjust the cost sharing structure and make certain other alternations and amendments by entering into an amended and restated agreement for maintenance and repairs of flood control and associated drainage facilities located on County property in former Drainage District No. 6 ("Amended and Restated Agreement"), with an effective date of September 1, 2009; and

- I. WHEREAS, the term of the Amended and Restated Agreement expired on September 1, 2014; and
- J. WHEREAS, PSE notified the City and the County in 2014 that after it upgraded its facilities located in the former Drainage District No. 6 it does not want to participate in a new maintenance agreement; and
- K. WHEREAS, the Parties desire to modify the Amended and Restated Agreement to extend the term, adjust the cost sharing structure, and make certain other alterations and amendments necessitated by the removal of PSE as participant as set forth herein by entering into a modified agreement for maintenance and repairs of flood control and associated drainage facilities located on County property in former Drainage District No. 6 ("Agreement"); and
- L. WHEREAS, the Parties desire to continue cooperating in the maintenance and repair of the Facilities in the former Drainage District No. 6 for their mutual benefits during the term of this Agreement while the Parties evaluate possible future options regarding their property and assets; and
- M. WHEREAS, the Parties agree, pursuant to the terms and conditions of this Agreement to cooperate and fund the maintenance and repair of these Facilities.

NOW, THEREFORE, in consideration of the mutual benefits and covenants contained herein, the Parties agree as follows:

1. ASSETS OF PARTIES

City Water Transmission Line. The City owns and operates Water Transmission Line No. 5 located within easements crossing property owned by the County within former Drainage District No. 6 in Snohomish County. The City retains sole authority and responsibility for the design, construction, repair, maintenance, and operation of its water transmission line before, during and after the maintenance activities undertaken pursuant to this Agreement. This Agreement shall not be construed as an assumption by the County of any authority, responsibility, or liability with regard to the design, construction, repair, maintenance, or operation of the City's water transmission line nor shall the design, construction, repair, maintenance, or operation of the water transmission line be considered a joint undertaking, partnership, or joint venture by the City and the County.

County Property. The County owns real property located within former Drainage District No. 6 in Snohomish County. Located upon this property are flood control and associated drainage facilities constructed by the former Drainage District No. 6. The County's property is subject to easements granted to the City for its water transmission line.

2. TASKS COVERED BY THIS AGREEMENT

The Tasks performed under this Agreement shall be broken into two classifications: a) on-going maintenance, and b) unforeseen or catastrophic failures (collectively referred to herein as "Tasks").

A. On-Going Maintenance. The Parties propose to undertake on-going inspections, maintenance, and other actions during the term of this Agreement to facilitate a functioning flood control system. These activities include but are not limited to the following efforts performed on an annual basis or as needed based on annual inspections:

Dike Maintenance

- Annual mowing of the dike top and shoulders to allow access for maintenance, inspection, and repairs.
- Removal of hazard trees that threaten integrity of the dike.
- Maintenance of a drivable surface on the top of the dike.
- Repair of any dike sloughs that could threaten the integrity of the dike.
- Undertake appropriate inspections of facilities to help identify any possible issues that require additional maintenance or repairs.

Drainage Maintenance

- Removal of beaver dams that block drainage ditches where accessible.
- Occasional cleaning of drainage ditches.
- Removal of sediment buildup in drainage pipes.
- Repair and replacement of tidegates.
- Undertake appropriate inspections of facilities to help identify any possible issues that require additional maintenance or repairs.

The estimated annual cost for these tasks is \$20,000.

B. Unforeseen or Catastrophic Failures. In the event of unforeseen or catastrophic failures of the Facilities during the term of this Agreement, the Parties agree that it is in their collective best interest to develop a process to address any such issues. The types of unforeseen or catastrophic failures could include dike breaches, dike erosion, and major damage to tidegates or pipe collapse. However, it is impossible to predict where and of what order of magnitude this damage might be.

Nevertheless, the Parties agree that in the event of an unforeseen or catastrophic failure during the term of this Agreement, corrective measures shall be undertaken as follows. For any unforeseen or catastrophic failure with a projected repair cost up to \$300,000, the Parties agree to proceed with the repair with the cost split per Section 3.A. For any unforeseen or catastrophic failure with a projected repair cost of more than \$300,000, the Parties agree to cost share costs up to the \$300,000 per the repair cost split per Section 3A, and to meet and either a) consent to proceed with the remaining repairs according to the cost

sharing arrangement specified in Section 3.A of this Agreement; b) reject or modify the proposed repairs; or c) in the event the Parties are unable to reach an agreement under a) or b) of this paragraph, either Party may undertake the necessary repairs at their own cost, but this will not otherwise impair or limit the rights, claims, or interests of either Party, individually or otherwise.

The Parties agree that in the event of an unforeseen or catastrophic failure, each Party will make reasonable efforts to coordinate and work with the other Party to secure outside funding.

3. RESPONSIBILITIES

A. Cost Sharing – Each Party to this agreement shall be responsible for their share of the costs related to the Tasks according to the following distribution schedule:

| | |
|------------------|-----|
| Snohomish County | 35% |
| City of Everett | 65% |

Costs necessary to perform Tasks described in Section 2 of this Agreement shall include, but are not limited to the following: purchase of materials, design, engineering, mitigation, maintenance, labor, and equipment costs, construction contract costs, and permitting costs necessary to accomplish this work.

If approved by all Parties, the aforementioned cost sharing would also fund a third party administrator to assist with the management of Tasks enumerated under this Agreement.

B. Specific Tasks

1. Snohomish County – In addition to sharing of costs as described in Section 3.A, the County will be the project manager and lead party for submitting permit applications to appropriate regulatory agencies to accomplish the Tasks, unless both Parties agree otherwise. Permit requirements are expected to vary depending on the nature and location of the work and may be exempt due to maintenance exemptions. However, permits may include but are not limited to the following – Corps of Engineers (404 and/or Section 10), State of Washington (HPA and 401 certification), and Snohomish County (Shorelines, Land Disturbing Activity, Critical Areas compliance). It is understood that timing and terms of issuance of permits are controlled by the issuing agencies.

The Tasks may be accomplished by County crews and/or City crews, or by construction contract administered by the City or by the County. If County or City crews are used to perform the Tasks, the management committee shall review and approve the tasks, estimated cost, and schedule for the projects. If outside contractors are used to perform the tasks, a competitive bidding process shall be used to select the contractors.

The County will secure permits and other approvals in a timely manner as required to undertake any of the Tasks enumerated in Section 2 of this Agreement, unless both parties agree otherwise

On an annual basis, the County will also provide the City with a report that will summarize Tasks performed during the preceding year, associated costs, and Tasks (with associated estimated costs) planned for the next year. Because the City may alter, relocate, analyze, or adapt its assets during the term of this Agreement, the County will also provide reasonable timely assistance with regard to these efforts, including but not limited to the following: process of any needed permits, assistance with easement and right of way requests, and review and evaluation of any necessary construction agreements.

2. City of Everett – In addition to sharing of costs as described in Section 3.A, the City will work closely with the County to accomplish the Tasks as necessary. The Tasks may be accomplished by County crews and/or City crews, or by construction contract administered by the City or by the County and consistent with the requirements set forth above in paragraph 3.B.1. The City will also assist the County as needed in explaining the need for the Tasks with regard to applications for necessary corresponding permits.

C. Management Committee

The Parties will designate a committee (“Management Committee”) that shall be comprised of one person from each Party to this Agreement and shall have final authority with regard to the scope and performance of Tasks and all other responsibilities enumerated in this Agreement, including overhead rates to be applied to in-kind services. The Management Committee would meet as frequently as the Management Committee deems appropriate. For purposes of the Interlocal Cooperation Act, chapter 39.34 RCW, the Management Committee shall constitute the joint board responsible for administering the Agreement.

4. **TERM OF THE AGREEMENT**

This Agreement shall be in effect upon execution and shall remain in effect for a period of 5 (five) years thereafter, unless a) the Parties renew or amend the Agreement as provided in Section 14 or b) the Parties terminate the Agreement as provided in Section 12. Prior to becoming effective, the Agreement shall be posted on the Snohomish County Council website pursuant to the Interlocal Cooperation Act, RCW 39.34.040.

5. **PAYMENTS**

Each Party to this Agreement is responsible for payment of its share of the actual costs according to the schedule shown in Section 3.A, and shall remit payment within 30 days of receipt. The County shall gather information on costs accrued under this Agreement, including Tasks performed by the County and the City. The City shall provide cost information on Tasks it performs within 60 days of the completion of the work. For Tasks where the total cost of the work is estimated to be under \$100,000, the County will provide a statement to the City on a quarterly basis. For major Tasks where the total cost is estimated

to be greater than \$100,000, prior to initiation of the work, each Party to this Agreement shall place its estimated share of the cost in an account to be managed by the County. The County will be responsible for dispersing funds, reconciling final costs and invoicing or reimbursing each Party for any remaining share of the cost within 60 days of completion of the work.

6. LICENSES FOR USE OF FACILITIES LOCATED ON COUNTY PROPERTY

In consideration of the financial contributions set forth herein and the covenants expressed herein, the County grants licenses to the City thereby permitting the City to continue to make use of the Facilities located on the County's property during the term of the Agreement to obtain such flood control and/or drainage benefits as may, from time to time, occur as a result of the existence of the facilities located upon the County's property. The County further covenants that during the term of this Agreement, it shall not revoke the licenses herein granted unless compelled by law to do so and it shall take no action to remove or intentionally damage the Facilities located upon its property or to interfere with the City's use of those Facilities to obtain possible flood control and/or drainage benefits.

7. CITY EASEMENTS

The City possesses easements and/or other rights securing its use of the County's property wherein the Facilities are located for the purpose of locating, maintaining and operating their water transmission lines. Except as provided in the express waivers and releases set forth in Section 11, nothing contained in this Agreement is intended nor shall it be construed as restricting, limiting, terminating, expanding, or in any other way affecting any of the rights of the Parties under such easements and/or other rights.

8. COUNTY'S DISCLAIMERS AND LIMITATION OF OBLIGATIONS

In granting the licenses and making the covenants set forth herein, the Parties agree that, consistent with the provisions of RCW 36.96.040 (dissolution of inactive special purpose districts by county legislative authority), the County has no obligations as successor to former Drainage District No. 6 or otherwise and the County's only obligations to the other Parties as concerns the subject matter of this Agreement are those provided by the express written terms of this Agreement and the Tasks specified herein.

Further, nothing in this Agreement is intended to nor shall it be construed as creating a new drainage or other special purpose district wherein the Facilities are located and all Parties agree to waive any claim that this Agreement or the execution of it by the County constitutes the creation of any such new district.

The County specifically disclaims and disavows any responsibility with regard to the property and facilities within former Drainage District No. 6 above and beyond that which existed prior to the execution of this Agreement, including but not limited to any warranty, express or implied, that the Facilities have been, are, or will be designed, constructed, or maintained to provide any flood control, drainage, or other benefit to any person or entity.

9. CITY COVENANTS

As to the City's determinations with regard to whether the City will obtain any flood control or drainage benefit from the Facilities located upon the County's property or the Tasks covered by this Agreement, the City relies solely and entirely upon its own evaluation and expressly disavows that it has relied in any respect upon any statement or representation of the County.

10. HOLD HARMLESS AND INDEMNIFICATION

A. The City shall hold harmless, indemnify, and defend the County its officers, directors, officials, employees, agents, and operators from and against any and all claims, actions, suits, liability, loss, expenses, damages, and judgments of any nature whatsoever, including costs and attorney's fees in defense thereof, for injury, sickness, disability or death to persons or damage to property or business, caused by or arising out of the City's acts, errors or omissions in the performance of this Agreement. PROVIDED HOWEVER, that the City's obligation hereunder shall not extend to injury, sickness, death or damage caused by or arising out of the sole negligence of the County, its officers, directors, officials, employees, agents, or operators. PROVIDED FURTHER, that in the event of the concurrent negligence of the Parties, the City's obligations hereunder shall apply only to the percentage of fault attributable to the City, its employees or agents.

With respect to the City's obligations to hold harmless, indemnify and defend provided for herein, but only as such obligations relate to claims, actions, or suits filed against the County, the City further agrees to waive its immunity under the Industrial Insurance Act, Title 51 RCW, for any injury or death suffered by the City's employees caused by or arising out of the City's acts, errors, or omissions in the performance of this Agreement. This waiver is mutually negotiated by the Parties.

The City's obligations to hold harmless, indemnify, and defend the County, its officers, directors, officials, employees, and agents pursuant to this paragraph shall apply to any and all claims, actions, suits, liability, loss, expenses, damages, and judgments of any nature whatsoever, including costs and attorney's fees in defense thereof, for injury, sickness, disability, or death to persons or damage to property or business, caused by or arising out of the City's acts, errors or omissions in the design, construction, repair, maintenance, or operation of its water transmission line.

The City's obligations hereunder shall include, but are not limited to, investigating, adjusting, and defending all claims alleging loss from action, error, or omission, or breach of any common law, statutory or other duty by the City, the City's employees, agents, or subcontractors.

B. The County shall hold harmless, indemnify and defend the City, its officers, directors, officials, employees, agents from and against any and all claims, actions, suits, liability, loss, expenses, damages and judgments of any nature whatsoever, including costs and attorney's fees in defense thereof, for injury, sickness, disability, or death to persons or damage to

property or business, caused by or arising out of the County's acts, errors or omissions in the performance of this Agreement. PROVIDED HOWEVER, that the County's obligation hereunder shall not extend to injury, sickness, death or damage caused by or arising out for the sole negligence of the City, its officers, directors, officials, employees, agents, or operators. PROVIDED FURTHER, that in the event of the concurrent negligence of the Parties, the County's obligations hereunder shall apply only to the percentage of fault attributable to the County, its employees or agents.

With respect to the County's obligations to hold harmless, indemnify and defend provided for herein, but only as such obligations relate to claims, actions or suits filed against the City or PSE, the County further agrees to waive its immunity under the Industrial Insurance Act, Title 51 RCW, for any injury or death suffered by the County's employees caused by or arising out of the County's acts, errors or omissions in the performance of this Agreement. This waiver is mutually negotiated by the Parties.

The County's obligations hereunder shall include, but are not limited to, investigating, adjusting, and defending all claims alleging loss from action, error or omission or breach of any common law, statutory or other duty by the County, the County's employees, agents, or subcontractors.

11. WAIVER AND RELEASE OF CLAIMS

The City hereby waives any and all claims against the County for damage, whether direct, indirect or consequential, to its water transmission line or other property or for injury to or death of any of its officers, agents or employees which may in any way arise from the pursuit or accomplishment of the Tasks contemplated under this Agreement and waives any and all claims against the County that any actions associated with the pursuit or accomplishment of the Tasks contemplated under this Agreement interfere with or affect the City's water transmission line easement rights and releases the County from any and all liability therefore.

The City further specifically acknowledges that it is participating in the Tasks contemplated under this Agreement at its own risk and that the foregoing waiver and release applies to all activities associated with such Tasks. The City further covenants that it will make no claim against the County in any way related to such Tasks whether related to design, construction or otherwise.

12. TERMINATION

A. This Agreement may be terminated at the end of a calendar year by either Party for any reason by providing written notice delivered by regular mail to the other Party's contact persons at the addresses set forth herein by June 30th of said year. The June 30th notice deadline does not apply in the event either Party fails to obtain the necessary appropriation.

B. The County's and the City's obligations after December 31, 2015, are contingent upon local legislative appropriation of necessary funds in accordance with applicable laws which

the County and the City agree to take reasonable efforts to secure. Upon the failure of such appropriation, this Agreement may be terminated by 30 days prior written notice to the other Party's contact persons by the governmental Party that has failed to receive the necessary appropriation. In the event that a Party anticipates that a necessary appropriation for this Agreement will not be made, that Party will make reasonable efforts to provide notice to the other Party as early as possible to allow such Party to plan and budget for such an event.

13. SURVIVAL

The covenants, disclaimers, waivers and releases of the Parties set forth in Sections 8, 9, 10 and 11 of this Agreement shall survive the termination of this Agreement.

14. AMENDMENT/RENEWAL

A. The Director of the County's Department of Public Works (the "County's Public Works Director") shall have the authority to amend and/or renew this Agreement on behalf of the County to the extent and under the circumstances described in this Section 14, without the need to obtain additional approvals from the County Council or the County Executive.

B. The County's Public Works Director shall have the authority to extend the term an additional five (5) years beyond the initial five (5) year term provided for in Section 4.

C. In order to be effective, any amendment or renewal of this Agreement must be memorialized in writing, executed by both Parties, and posted on the Snohomish County Council web site pursuant to RCW 39.34.040.

15. PROPERTY

Except as expressly provided to the contrary elsewhere in this Agreement, any real or personal property used or acquired by either Party in connection with the performance of this Agreement will remain the sole property of such Party and the other Party shall have no interest therein.

16. NO THIRD PARTY RIGHTS

Nothing contained in this Agreement is intended to, nor shall it be construed to, create any rights in any person or entity not a party thereto.

17. INTEGRATED AGREEMENT; SUPERCISSION OF THE AMENDED AND RESTATED AGREEMENT

This Agreement constitutes the entire agreement between the Parties regarding the subject matter hereof and may be modified only in writing signed by each Party to this Agreement. This Agreement entirely supersedes and replaces the Amended and Restated Agreement.

18. NOTICES

Any notices to be given under this agreement shall be delivered in person or mailed to the Parties at the following addresses:

City of Everett

Mark Sadler
Maintenance Superintendent
Public Works Department
City of Everett
3200 Cedar St
Everett, WA 98201

Snohomish County

Steven Thomsen
Director of Public Works
Snohomish County
3000 Rockefeller Avenue
Everett, WA 98201

19. APPLICABLE LAW

This Agreement shall be governed by the laws of the State of Washington.

20. ENTIRE AGREEMENT, WAIVER OF DEFAULT

The Parties agree that this Agreement is a complete expression of the terms hereto and any oral representations or understandings not incorporated herein are excluded. The waiver of any default by either Party shall not be deemed as a waiver of any subsequent default. Waiver of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of this Agreement.


21. SEVERABILITY

If any provision of this Agreement is found to be invalid or contrary to law, the remainder of this Agreement shall not be affected thereby.

IN WITNESS THEREOF, the Parties have executed this AGREEMENT as of the day and year first written above.

CITY OF EVERETT

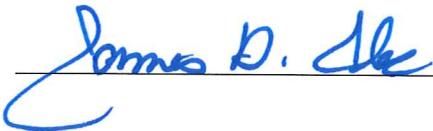
BY:


Ray Stephanson
Mayor

ATTEST:

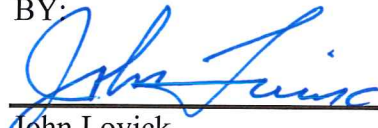

Sharon Jule
City Clerk

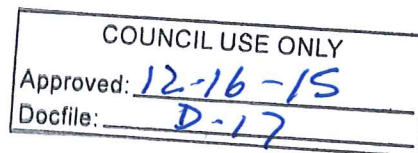
Approved as to form:
Office of the City Attorney:



SNOHOMISH COUNTY

BY:


John Lovick
County Executive



ATTEST:


Cora E. Palmer

Approved as to form:
Snohomish County Prosecutor:

 9/2/15

Agreement Amended

EVERETT CITY COUNCIL AGENDA ITEM COVER SHEET

PROJECT TITLE:

Modified Agreement for
Maintenance and Repairs of
Flood Control and Associated
Drainage Facilities Located on
County Property in Former
Drainage District No. 6

☒ Briefing
☐ Proposed Action
☐ Consent
☐ Action
☐ First Reading
☐ Second Reading
☐ Third Reading
☐ Public Hearing
☐ Budget Advisory

COUNCIL BILL #

Originating Department

Contact Person

Phone Number

FOR AGENDA OF

Public Works

Mark Sadler

425-257-8967

July 22, 2015

Initialed by:

Department Head

CAA

Council President

db
Jo

Location

Water Transmission Line
No. 5, east of Ebey
Slough

Preceding Action

Original Agreement,
May 04; Revised
Agreement of October
2006 and Amended and
Restated Agreement of
September 2009

Attachments

Modified Agreement for
Maintenance and Repairs

Department(s) Approval

Legal, Public Works

| | | |
|----------------------|---|--------------------------------------|
| Amount Budgeted | | |
| Expenditure Required | W/in Utilities transmission line annual maintenance budget | Account Number(s): 401-5-710-118-650 |
| Budget Remaining | | |
| Additional Required | -0- | |

DETAILED SUMMARY STATEMENT:

The former Drainage District No. 6 (DD6) and its facilities provided flood protection for assets owned by the City, County, and Puget Sound Energy (PSE). In August of 2002 the County Council officially dissolved DD6. The City entered into a maintenance agreement with the County and PSE in 2004, which was revised in 2006 and 2009.

This action would approve a modified agreement to reflect Puget Sound Energy's desire to terminate their participation. This agreement between the County and City details the tasks and projects needing completion, delegates the responsibilities and outlines cost sharing to maintain the former DD6 facilities protecting Water Transmission Line No. 5.

RECOMMENDATION (Exact action requested of Council):

Authorize the Mayor to sign the Modified Maintenance and Repair Agreement for the Flood Control and Drainage Facilities located on County property in former Drainage District No. 6.

*Council Approval
on 7/29/15
JA*